



Federal Communications Commission
Washington, D.C. 20554

June 7, 2011

DA 11-1008

In Reply Refer to:
1800B3-ML

David Tillotson, Esq.
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In re: **Frank J. Neely**

New FM Station
Due West, South Carolina
Facility ID 166080
File No. BNPH-20060324AFR

Petition for Reconsideration

Dear Counsel:

We have before us a June 16, 2009, Petition for Reconsideration ("Petition") filed on behalf of Frank J. Neely ("Neely"). The Petition requests reconsideration of a forfeiture order¹ issued to Neely for willfully violating Sections 73.3573(f)(5)(i) and 73.5005(a) of the Commission's Rules ("Rules")² by failing to timely file a post-auction Form 301 application. For the reasons stated below, we deny the Petition.

Background. In a Public Notice released February 8, 2006, the Commission named Neely the winning bidder in FM Auction No. 62 for the FM Construction Permit in Due West, South Carolina.³ Sections 73.3573(f)(5)(i) and 73.5005(a) of the Rules required Neely to file a post-auction FCC Form 301 "long form" application by March 10, 2006.⁴ The *Auction 62 Closing Public Notice* cautioned that "[a]n applicant that fails to submit the required long form application before the specified deadline, and fails to establish good cause for any late-filed submission, will be deemed to have defaulted and shall be subject to the payments set forth in Section 1.2104(g) of the Commission's rules."⁵ Despite this warning, Neely did not file his Form 301 application until March 24, 2006. Neely submitted a request for waiver of the filing deadline with his application.⁶

On July 21, 2006, the Media Bureau ("Bureau") granted Neely's waiver request but issued a Notice of Apparent Liability for Forfeiture ("NAL") in the amount of three thousand dollars (\$3,000) to

¹ *Frank Neely, Forfeiture Order*, 24 FCC Rcd 7740 (MB 2009) ("*Forfeiture Order*").

² 47 C.F.R. §§ 73.3573(f)(5)(i), 73.5005(a).

³ *Auction of FM Broadcast Construction Permits Closes- Winning Bidders Announced for Auction No. 62*, Public Notice, 21 FCC Rcd 1071 (MB/WTB 2006) ("*Auction 62 Closing Public Notice*").

⁴ 47 C.F.R. §§ 73.3573(f)(5)(i), 73.5005(a). These sections require a winning bidder to file its long-form application within 30 days of the release of the public notice announcing the close of the auction.

⁵ *Auction 62 Closing Public Notice*, 21 FCC Rcd at 1076.

⁶ *Forfeiture Order*, 21 FCC Rcd at 8011.

Neely for violating Sections 73.3573(f)(5)(i) and 73.5005(a) of the Rules by failing to timely file a post-auction Form 301 application. Neely responded to the NAL on August 3, 2006, arguing that cancellation of the forfeiture was warranted because: (1) he did not “fail to file a required form” but rather filed it late, and (2) he filed his Form 301 application voluntarily without any reminder from the Commission.⁷ On June 8, 2009, the Bureau rejected Neely’s arguments and issued the *Forfeiture Order* in the amount of three thousand dollars (\$3,000).

On June 16, 2009, Neely filed the instant Petition.⁸ He claims that the *Forfeiture Order* should be rescinded because: (1) the forfeiture amount is inconsistent with that issued to other licensees in similar situations, in contravention of *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965),⁹ (2) filing the Form 301 application after the deadline did not prejudice any other party; and (3) the Commission lacks the authority to impose forfeitures on small entities such as Neely.¹⁰

Discussion. Petitions for reconsideration are granted only in limited circumstances.¹¹ Absent a material error or omission in the underlying order, or, unless a petitioner raises additional facts not known or not existing until after the petitioner’s last opportunity to present such matters, reconsideration is not warranted.¹² Neely has not met this burden.

Neely first contends that the Commission does not ordinarily issue forfeitures for late-filed Form 301 applications. Thus, he claims we should rescind the *Forfeiture Order* because it violates the principles set forth in *Melody Music, Inc. v. FCC*.¹³ We reject this unsupported argument. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended,¹⁴ Section 1.80 of the Rules,¹⁵ the Commission’s *Forfeiture Policy Statement*,¹⁶ and was consistent with prior forfeitures for similar violations.¹⁷

Neely next asserts that the *Forfeiture Order* should be rescinded because his late filing did not prejudice any party.¹⁸ Again, we disagree. The Bureau does not consider the absence of public harm a

⁷ *Id.* at 7740.

⁸ Petition at 1.

⁹ *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965).

¹⁰ Petition at 1-2.

¹¹ See 47 C.F.R. § 1.106; *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

¹² *Id.*

¹³ 345 F.2d at 730.

¹⁴ 47 U.S.C. § 503(b).

¹⁵ 47 C.F.R. § 1.80.

¹⁶ *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 Rcd 303 (1999) (“*Forfeiture Policy Statement*”).

¹⁷ See *Grace Baptist Church*, Forfeiture Order, 25 FCC Rcd 7473 (MB 2010) (issuing \$3,000 forfeiture for licensee’s failure to timely file its renewal application); *Mid-Coast Radio Project, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 2201 (MB 2009) (proposing \$3,000 forfeiture for licensee’s failure to timely file its renewal application).

¹⁸ Petition at 4.

mitigating factor in a Rule violation.¹⁹ Regardless, the untimely filing of applications harms the public interest by disrupting the Commission's administrative process.²⁰

Finally, Neely argues that the *Forfeiture Order* should be rescinded because the Bureau's *Forfeiture Policy Statement*²¹ is unenforceable. Specifically, Neely maintains that the *Forfeiture Policy Statement* does not meet the requirements of the Small Business Regulatory Enforcement and Fairness Act of 1936 ("SBREFA")²² because it was not specifically formulated to respond to the SBREFA and applies to other entities besides small businesses.²³ As such, Neely argues that until the Commission adopts a specific policy or program for reducing or waiving civil penalties for the regulatory or statutory violations of regulated small entities, it lacks the authority to impose any penalties on small entities.

The Commission has already held that the *Forfeiture Policy Statement* complies with Section 223 of the SBREFA because it provides for reduction or waiver of forfeitures levied on small businesses pursuant to a series of specified downward adjustment factors.²⁴ Indeed, the United States District Court for the District of South Carolina recently endorsed the Commission's position in a case involving Neely.²⁵ The Court held that "aforementioned Commission's decisions, statements and analysis represent a sound interpretation of the [SBREFA]" to the extent that they do provide for the possibility of reductions and waivers of forfeitures for small businesses."²⁶ Consequently, Neely's SBREFA argument does not support reconsideration of the *Forfeiture Order*.

Conclusion/Actions. Accordingly, IT IS ORDERED THAT the Petition for Reconsideration filed on June 16, 2009, by Frank J. Neely, IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Mr. Frank J. Neely

¹⁹ *Robert J. and Katherine M. Bohn*, Forfeiture Order, 25 FCC Rcd 1192 (MB 2011).

²⁰ *Id.*

²¹ *Forfeiture Policy Statement*, 12 FCC Rcd at 17087.

²² P.L. § 223.

²³ *Forfeiture Policy Statement*, 12 FCC Rcd at 17087.

²⁴ See *Phoenix Broadcasting Group, Inc.*, Memorandum Opinion and Order, 2011 WL 1455451 (MB 2011), citing *Forfeiture Policy Statement*, 12 FCC Rcd at 17109, ¶¶ 51, 52.

²⁵ *U.S. v. Neely*, 595 F. Supp.2d 662, 668-69 (D.S.C. 2009).

²⁶ *Id.*